Criminal Procedure in the Syariah Courts

Shamrahayu A Aziz
LLB, LLB Shariah (IIUM), MCL (IIUM), DSLP (IIUM), PhD (IIUM)
Associate Professor, Ahmad Ibrahim Kulliyyah of Laws
International Islamic University Malaysia
**Recommended Stockists**

**Australia**
Thomson Legal and Regulatory Limited
Brisbane, Sydney, Melbourne, Perth

**Canada and USA**
Carswell
Ottawa, Toronto, Calgary, Montreal, Vancouver

**Hong Kong**
Thomson Reuters Hong Kong Ltd
Hong Kong

**India**
NM Tripathi (Private) Ltd
Bombay

Eastern Law House (Private) Ltd
Calcutta

MPP House
Bangalore

Universal Book Traders
Delhi

**Indonesia**
Pt Ina Publikatama
Jakarta

**Japan**
Kinokuniya Co Ltd
Tokyo

Kokusai Shobo Ltd
Tokyo

**Malaysia**
Thomson Reuters Malaysia Sdn Bhd
trading as
Sweet & Maxwell Asia

**New Zealand**
Brookers
Auckland

**Pakistan**
Pakistan Law House
Karachi, Lahore

**Philippines**
MegaTEXTS Phil Inc
Cebu

**Singapore**
Thomson Reuters Corporation Pte Ltd
trading as
Sweet & Maxwell Asia

**South Korea**
Information & Cultural Korea
Seoul

**Thailand**
Booknet Co Ltd
Bangkok

Kinokuniya Bookstores
Bangkok

**UK/Europe/Middle East/Africa**
Sweet & Maxwell Ltd
London
Criminal procedure is the branch of law containing the rules governing the administration of criminal justice. It commences with investigation and ends with discharge or acquittal, or with conviction and imposition of sentence and punishment against the accused/convicted persons. The law aims to ensure a proper, fair and just process in the enforcement of criminal law. Islamic law has the same concept with specific rules governing the administration of criminal justice. Although Islamic criminal procedure contains sufficient basis and conceptual ideas supported by the primary and secondary sources of Islamic law, it is historically less developed compared to other branches of law.

In Malaysia the criminal process became more comprehensive after the enactment of a specific set of laws known collectively as the Syariah Criminal Procedure law. The passing of the law was timely as criminal cases and issues on human rights were regularly taking center stage.

Under the federal scheme of the distribution of legislative powers between the Federal and the State governments as provided for by the Malaysian Federal Constitution, the Syariah legislation in Malaysia (including the Syariah Criminal Procedure law), is a state matter. Thus, beginning 1983, the States started to enact specific Syariah Criminal Procedure law, when Kelantan took the lead by enacting the Syariah Criminal Procedure Code in 1983 (En 9/1983 – now repealed by En 9/2002). At present, all Malaysian States (including the three Federal Territories) have enacted and adopted their own Syariah Criminal Procedure law. The current Syariah Criminal Procedure legislation provides for a better and more comprehensive Syariah criminal procedure system as compared to the earlier provisions which were found under the Administration of Islamic Law of the States.

Given the brief background of the law in Malaysia, this book *Criminal Procedure in the Syariah Courts* attempts to describe the applicable criminal procedure in the Syariah courts and the contents of the Syariah Criminal Procedure law. Much of this book is concerned with the understanding of the provisions of law and their application. In other words, this book explains the basic idea and practice of the law in a simple narrative style of presentation to make the ideas easily understood. It is written with the aim of providing introductory but essential reading for students and those interested in the Islamic administration of criminal justice, though
some other crucial issues such as the rights of accused persons are briefly
addressed. The book discusses various aspects of the Syariah criminal
process with constant reference to relevant provisions of statutory law
and Syariah case law.

The investigation process is always a point of contention from which
human right issues often arise. This book explains the nature and
concept of investigation, including search, seizure, arrest, detention and
other related procedures from the Islamic point of view with regular
reference to the Syariah sources. It is submitted in this book that although
investigation is allowed in Islam, it is an exception to the general concept
of Islamic principles which emphasise the importance of respect for
human dignity and privacy. Investigation should thus always be guided
by fundamental Islamic spirit.

The publication of this book comes at a crucial time when various
incidents have taken place that could eventually turn out to be the
defining moment which clarifies the powers of religious enforcement
officers in the enforcement of Islamic criminal law in the country. Issues
at hand are becoming more complicated and indeed we need a “starter”
to interpret, to discuss and to further develop and improve the Syariah
Criminal Procedure law. This book is the first of its kind in the country
although the author has written a number of journal articles on the
subject.

Shamrahayu A Aziz
July 2011
I wish to thank those who have assisted me in various ways that led to the publication of this book. First and foremost, I would like to thank all my undergraduate and postgraduate students for their support and encouragement. Some ideas in this book have been generated through class discussion and interaction with the students. I am very much indebted to them.

It is a pleasure to extend my sincere gratitude and thanks to the International Islamic University Malaysia. In particular, I would like to extend my gratitude and thanks to the Rector, Ybhg Prof Dato' Sri Dr Syed Arabi Aidid, for providing me with comfortable facilities in the University which were conducive to my writing activities. Similarly, my gratitude and thanks are due to Prof Dr Mohd Akram Shair, the Dean, Ahmad Ibrahim Kulliyyah of Laws (AIKOL), and Dr Badruddin Ibrahim, Head of Islamic Law Department, AIKOL.

The publishers, Sweet and Maxwell Asia and the capable editors, Mohd Zakry and Kevin Ooi, merit a mention here for their patience and perseverance. They are instrumental to this publication. My sincere thanks to the editorial and production teams for the preparation of the book cover and the tables of cases and statutes.

I wish to convey my earnest appreciation to my family for their sacrifices. I have deprived them of their entitlement to my attention and affection while I was engaged with my computer in preparing the manuscript. I cannot repay all that except by loving them all and may Allah give them strong faith and good health.

Last but not least, special thanks to all my colleague and friends, in particular Prof Dr Abdul Aziz Bari, Assoc Prof Dr Farid Sufian Shuaib and Asst Prof Dr Mohd Hisham Mohd Kamal, who have always given me moral support in my academic activities.

Shamrahayu A Aziz
Gombak
July 2011
Contents

Preface ............................................................................................................................... vii
Acknowledgement ........................................................................................................... ix
Glossary ............................................................................................................................ xvii
Abbreviations ................................................................................................................... xxi
Table of Cases .................................................................................................................. xxiii
Table of Statutes ............................................................................................................... xxv

Introduction ...................................................................................................................... 1

Chapter 1
General Discussion on Islamic Judiciary and Criminal Procedure ..................................... 5
Principles of judiciary in Islam ............................................................................................. 7
Early courts admininistration in Islam .................................................................................. 10
Principles of al-Qadha' al-Qadhial Qadhi and the letter of Umar al-Khattab (RA) ................. 12
A general perspective on Syariah Criminal Procedure ...................................................... 16

Chapter 2
Syariah Courts In Malaysia – A Brief Overview ............................................................... 17
Constitution of Syariah Courts ........................................................................................... 17
Appointment of judges and registrars in Syariah Courts .................................................... 18
Appointment of syariah prosecutors and religious enforcement officers ......................... 19
Appointment of syari'e counsel ......................................................................................... 20
Police officers and enforcement of Islamic Criminal Law .................................................. 21
Criminal jurisdiction of the Syariah Courts and the Federal Constitution ......................... 24
Syariah Courts Criminal Jurisdiction ................................................................................ 28
   Criminal Jurisdiction of Syariah High Court ................................................................. 28
   Criminal Jurisdiction of Syariah Subordinate Court ..................................................... 29
   Criminal Jurisdiction of Syariah Appeal Court .......................................................... 29
Syariah Courts and Article 121(1A) .................................................................................. 30
The applicable Criminal Procedure Law in Syariah Courts .............................................. 32
An overview on Syariah Criminal Procedure Act ............................................................ 33
Salient features of the Syariah Criminal Procedure Act ................................................... 36
Provisions on irregularities ............................................................................................... 37
### Chapter 3
**General Principles on Investigation** ............................................. 39
- Investigation process and human dignity ........................................ 39
- Investigation under the Syariah Criminal Procedure Act .................. 44
- Who shall conduct investigation ............................................... 44
- Commencement of investigation ............................................... 45
  - Information to religious enforcement officers ........................ 47
  - Complaint to a judge ....................................................... 48

### Chapter 4
**Arrest** ............................................................................. 51
- Arrest under the Syariah Criminal Procedure Act .......................... 52
- Types of arrest ........................................................................ 53
  - Arrest in seizable and non-seizable offences .............................. 53
  - Distinction between summons and warrant of arrest .................. 54
- Arrest with warrant ................................................................ 56
- When to issue a warrant of arrest? .......................................... 57
- Executing warrant of arrest and dealing with arrested person ....... 57
- Arrest without warrant ................................................................ 58
  - Who may arrest without warrant ........................................... 58
  - Who may be arrested without warrant ..................................... 60
  - Dealing with person arrested without warrant ......................... 62
  - Detention during investigation ........................................... 63
- Arrest and accompanying rights ............................................. 65

### Chapter 5
**Search, Seizure and Examination of Witnesses** .............................. 69
- Search of body ........................................................................ 69
- Search of premises ................................................................... 70
  - Provisions regarding search warrant ..................................... 72
- Seizure .................................................................................. 74
- Examination of witnesses ....................................................... 75

### Chapter 6
**Initiating Criminal Proceedings, Framing a Charge and Prosecution** .......................................................... 81
- Taking cognisance of offences .................................................. 81
- Sanction to prosecute .............................................................. 85
- Who may prosecute ............................................................... 85
- Compelling the appearance of the accused person in court ......... 88
  - Summons to appear .............................................................. 89
  - Warrant of arrest ............................................................... 92
- Charge ................................................................................... 93
- Framing a charge ..................................................................... 94
- Rules governing the form of charges ....................................... 94
Amendment of charge.......................................................... 96
Errors and irregularities in the charge........................................ 97
Filing criminal case in court.................................................. 97

Chapter 7
Trial....................................................................................... 99
Adversarial and inquisitorial systems......................................... 99
Jurisdiction regarding trial.................................................... 101
Overview on trial procedure.................................................. 104
  i. “Accused”......................................................................... 106
  ii. Preliminary objections and preliminary applications........ 107
  iii. Prosecution does not have to open the case.................. 107
  iv. Charge and “understand the charge”.............................. 108
  v. “Pleads guilty”.................................................................. 109
  vi. Charge as originally framed or as amended (s 96(b))........ 112
  vii. “… refuses to plead or does not plead or claims trial”.... 112
  viii. Evidence at trial.......................................................... 112
  ix. “No case to answer” and “a case to answer”.................... 114
  x. Defence’s case.......................................................... 115
  xi. “Discharge” and “acquittal”.......................................... 117
  xii. Taking evidence during trial......................................... 118
  xiii. Witnesses...................................................................... 118
  xiv. End of trial.............................................................. 119
  xv. Rights of accused during criminal trial......................... 120
  xvi. Powers and duties of courts during criminal trial.......... 122
  xvii. Powers and duties of prosecutor and defence
        counsel during criminal trial..................................... 124
  xviii. Change of judge during trial..................................... 124
  xix. Transfer of criminal case.......................................... 125
  xx. Adjournment of case.................................................. 126

Chapter 8
Judgment, Sentencing, Appeal and Revision................................. 129
Judgment and sentencing.................................................... 130
Judgment writing.................................................................... 133
Kinds of punishment............................................................. 134
Mitigating and aggravating factors........................................ 136
Appeal and revision............................................................ 140
  Appeal procedure.......................................................... 140
    Appeal to Syariah High Court......................................... 141
    Appeal to Syariah Appeal Court....................................... 144
Some issues regarding appeal............................................... 144
  Stay of execution........................................................... 144
  Appeal against conviction based on confession.................... 144
  Can appeal against a Syariah Subordinate Court decision
    be made straightaway to the Syariah Appeal Court?......... 145
Revision................................................................. 146
Appendices

Appendix A
Administration of Islamic Law
(Federal Territories) Act 1993 (Act 505) ........................................ 155
Section 38. Request for opinion from the Mufti ......................... 155
40. Constitution of Syariah Courts .................................. 155
41. Appointment of Chief Syariah Judge ......................... 155
42. Appointment of Judges of the Syariah Appeal Court .... 156
43. Appointment of Judges of the Syariah High Court .... 156
44. Appointment of Judges of Syariah
   Subordinate Courts .............................................. 157
45. Registrars .................................................................. 157
46. Jurisdiction of Syariah High Court ......................... 157
47. Jurisdiction of Syariah Subordinate Court ............... 158
48. Appeal to Syariah High Court .................................. 159
49. Application for leave to appeal .................................. 160
51. Supervisory and revisionary jurisdiction of the
   Syariah High Court .......................................... 160
52. Jurisdiction of Syariah Appeal Court ...................... 160
53. Supervisory and revisionary jurisdiction of the
   Syariah Appeal Court .................................. 161
54. Composition of the Syariah Appeal Court ............... 161
55. Decision by majority .............................................. 161
56. Continuation of proceedings in Syariah
   Appeal Court notwithstanding absence of Judge .. 161
57. Appeal rules ......................................................... 162
58. Appointment of Syariah Prosecutors and Religious
   Enforcement Officers ........................................ 162
59. Peguam Syarie ......................................................... 163

Appendix B
Syariah Court Evidence
(Federal Territories) Act 1997 (Act 561) ........................................ 167
Section 3. Interpretation .............................................. 167
17. Iqarat defined ...................................................... 167
18. Admissibility of iqarat ........................................ 167
87. Manner of giving evidence ..................................... 168
89. Order of production and examination of witnesses .. 168
90. Court to decide as to admissibility of evidence .... 169
91. Examination-in-chief, cross-examination and
   re-examination ................................................ 169
92. Order of examinations and direction of
   re-examination ................................................ 170
93. Cross-examination of person called to produce a
   document .......................................................... 170
94. Witnesses to character .......................................... 170
Section 95. Leading questions ............................................................... 170
96. When leading questions may not be asked ................................. 170
97. When leading questions may be asked ...................................... 171
98. Evidence as to matters in writing ............................................ 171
99. Cross-examination as to previous statements in writing ............. 172
100. Questions lawful in cross-examination ................................... 172
101. Court to decide when question shall be asked and when witness compelled to answer .................................................. 172
102. Question not to be asked without reasonable grounds ................ 173
103. Procedure of Court in case of question being asked without reasonable grounds ......................................................... 174
104. Indecent and scandalous questions ......................................... 174
105. Questions intended to insult or annoy ..................................... 174
106. Exclusion of evidence to contradict answers to questions testing veracity ................................................................. 174
107. Question by party to his own witness ..................................... 175
108. Impeaching credit of witness .................................................. 175
109. Questions tending to corroborate evidence of relevant fact admissible ................................................................. 176
110. Former statements of witness may be proved to corroborate later testimony as to same fact ............................................. 176
111. What matters may be proved in connection with proved statement which is garinah under s 20 or 21 .......................... 176
112. Refreshing memory .................................................................. 177
113. Testimony to facts stated in document mentioned in s 112 ........... 177
114. Right of adverse party as to writing used to refresh memory ...... 177
115. Production of documents and their translation .......................... 177
116. Giving as evidence of document called for and produced on notice ................................................................. 178
117. Using as evidence of document production of which was refused on notice ................................................................. 178
118. Judge's power to put questions or order production .................. 178
119. Determining that a witness is 'adil ............................................ 179
120. Witness to be examined through parties related to him ............... 179
121. Secret examination ................................................................. 179
122. Number of secret examiners .................................................... 180
123. Open examination .................................................................... 180
124. Testimony in open examination forms part of syahadah .......... 180
125. When witness need not be examined ....................................... 180
Section 126. Denial (ta’n) over a witness ................................. 181
127. When findings of witness examiners differ .................. 181
128. Dead or missing witness ........................................... 181
129. When witness required to take the oath ....................... 181

Appendix C
Syariah Court Civil Procedure
(Federal Territories) Act 1998 (Act 585) ................................ 185
Section 102. Request for issue of subpoena .......................... 185
103. Number of persons in subpoena ................................ 185
104. Subpoena to produce documents ............................... 185
105. Amendment of subpoena ........................................ 185
106. Service of subpoena ............................................... 186
107. Duration of subpoena ............................................. 186
108. Court records ...................................................... 186
109. Attendance of prisoner as witness or party ................ 186
110. Tender of expenses ............................................... 186
111. Affidavit of service of subpoena ............................... 187

Index .................................................................................. 189